



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 14, 1995

Mr. Greg Warmink
Attorney
Enforcement Coordination and Litigation Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-957

Dear Mr. Warmink:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34944.

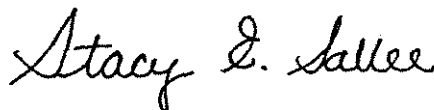
The Texas Natural Resource Conservation Commission (the "commission") received a request for documents relating to any enforcement action regarding the property on which is located the American Star Travel Plaza or any other property within five miles of that property. You claim that one of the requested documents is excepted from disclosure under sections 552.111, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claimed and have reviewed the document at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

We note that under the Water Code, the commission is authorized to issue orders and make determinations necessary to maintain the quality of the state's waters. Water Code §§ 26.019, .136; *see* 30 T.A.C. § 337.1. This office has previously held that contested cases under the Administrative Procedure and Texas Register Act, now the Administrative Procedure Act, are "litigation" for purposes of section 552.103(a). Open Records Decision No. 588 (1991).¹ You inform us that in September of 1993, the department instituted an enforcement action against parties potentially responsible for a diesel spill on the property that is the subject of the request. You state that the enforcement action is still pending. Therefore, the commission has met the first prong of the section 552.103(a) test. After reviewing the document submitted to this office for review, we conclude that it is related to the pending litigation. Therefore, the commission may withhold this document under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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Ref.: ID# 34944

Enclosure: Submitted document

¹We note that the rules in chapter 337 of the Administrative Code were adopted in the manner provided by the Administrative Procedure and Texas Register Act. Water Code § 5.103(c).

cc: Mr. Thomas R. Cox III
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Dallas, Texas 75202-2799
(w/o enclosure)